UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al.*, Plaintiffs v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants.	Master File No. 09-cv-118 (VM)
This Document Relates To: *Zohar v. Fairfield Greenwich Group*, No. 09-cv-4031 (VM) ("*Zohar*")	**ORAL ARGUMENT REQUESTED**

OBJECTION OF PLAINTIFFS NADAV ZOHAR AND RONIT ZOHAR TO CONSOLIDATION OF *ZOHAR* WITH *ANWAR V. FAIRFIELD GREENWICH LIMITED*

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Plaintiffs Nadav Zohar and Ronit Zohar (the "Zohars"), pursuant to ¶7 of the Court's Consolidation Order & Order for Appointment of Interim Co-Lead Counsel entered January 30, 2009, by and through their counsel, submit this Objection to consolidation of *Zohar v. Fairfield Greenwich Group*, No. 09-cv-4031 (VM) ("*Zohar*"), to the extent that *Zohar* asserts claims against several PricewaterhouseCoopers ("PwC") entities not parties to *Anwar v. Fairfield Greenwich Limited*, No. 09-cv-118 (VM) ("*Anwar*").[1]

PRELIMINARY STATEMENT

The *Zohar* complaint asserts claims for negligence and negligent misrepresentation against five PwC defendants – PricewaterhouseCoopers International Limited ("PwCIL"), PricewaterhouseCoopers LLP (US) ("PwC (US")), PricewaterhouseCoopers Bermuda, PricewaterhouseCoopers Accountants N.V., and PricewaterhouseCoopers LLP Chartered Accountants (collectively, "PwC Defendants") – arising out of their audit and other professional services rendered to Fairfield Sentry Ltd. ("Fairfield Sentry") for the benefit of Fairfield Sentry investors such as the Zohars. *See Declaration of Robert S. Schachter in Support of Objection of Plaintiffs Nadav Zohar and Ronit Zohar to Consolidation of Zohar with Anwar v. Fairfield Greenwich Limited,* filed May 20, 2009 (the "*Schachter Decl.*"), Ex. A ¶¶78-84, 154-164, 277-332. The *Anwar* Consolidated Amended Complaint does not assert claims against any PwC entity. *See Schachter Decl.* Ex. B (*Anwar* Consolidated Amended Complaint). *Anwar* merely ***mentions*** PwC (*see id.* ¶¶130, 132),[2] nothing more.

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[1] The Zohars recognize, to the extent they assert claims against common defendants in *Anwar*, that consolidation of *Zohar* is warranted, even where they have asserted some different claims against those common defendants. Thus, they make this Objection only as to the claims asserted in *Zohar* against PwC-related defendants.

[2] *Knight Services Holdings Ltd. v. Fairfield Sentry Ltd.*, No. 09-cv-2269 (VM) (S.D.N.Y.) ("*Knight*") – consolidated with *Anwar* without objection – asserts a cause of action for violation

The *Zohar* claims against the PwC Defendants stand separately from the claims already asserted in *Anwar*. They have different standards of pleading and proof. They have different elements. They entail different documentary and testimonial evidence. The claims against the PwC Defendants can stand separate and apart from the claims against the numerous other defendants named in *Anwar*.[3]

Consolidation of *Zohar*'s claims against the PwC Defendants, simply because the claims all arise out of the same Ponzi scheme, exalts a perception of judicial economy over fairness and efficiency over prejudice. A better alternative exists: deconsolidate and sever the claims against the PwC Defendants and coordinate discovery between *Zohar* and *Anwar* where appropriate.

FACTS

The Ponzi Scheme

Bernard Madoff ("Madoff") and Bernard L. Madoff Investment Securities, LLC ("BLM") engaged in a scheme to defraud investors, in part by raising money from investors through feeder funds (*i.e.*, funds that issued shares with the proceeds invested with (or fed into) Madoff and BLM). ¶2.[4] Rather than investing the money from the feeder funds, Madoff instead used it to pay off earlier investors. ¶5. Feeder funds, and others who purported to provide services to them, received fees from the total invested in the feeder funds by shareholders. ¶111. Often, those fees were calculated as a percentage of the net asset value of the fund (*id.*), notwithstanding that any increase in the fund's value came not from earnings on the money, but from raising new money

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of §10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") against a single PwC entity, PricewaterhouseCoopers LLP (*see Schachter Decl.* Ex. C (*Knight* complaint) ¶18), which appears to be the same entity named in *Zohar*: PricewaterhouseCoopers LLP Chartered Accountants.

[3] *Anwar* names 41 defendants. *See Anwar* Consolidated Amended Complaint ¶¶47-94.

[4] All paragraph (¶) cites are to the *Zohar* complaint unless otherwise noted.

from new investors. ¶5. It was a classic Ponzi scheme. ¶3.

Fairfield Greenwich Group ("FGG") established feeder funds (¶¶101, 102), the largest of which was Fairfield Sentry, that invested with Madoff and BLM. ¶104.[5] In total, FGG invested over $7.5 billion of feeder fund assets with Madoff and BLM. ¶¶8, 105.

Fairfield Sentry retained PricewaterhouseCoopers ("PwC") to audit its financial statements. ¶154. Indeed, two offices of PwC purported to audit the Fairfield Sentry financial statements in accordance with either International Standards on Auditing or Generally Accepted Auditing Standards. ¶¶155, 158. Each year, and notwithstanding PwC's obligations as defined by the relevant auditing standards, PwC issued clean audit opinions on Fairfield Sentry's financial statements, declaring either "In our opinion the financial statements give a true and fair view of the financial position of the Company" or "In our opinion, the accompanying [financial statements], present fairly, in all material respects, the financial position of Fairfield Sentry Limited." ¶¶155, 158 (alteration in original).

Procedural History of Fairfield Greenwich Group-Related Lawsuits

On the heels of Madoff's admission that "his money management business was a fraud," (¶3), investors in the various feeder funds, including investors in funds managed by FGG, filed lawsuits. *See, e.g.*, *Anwar* (class action); *Pacific West Health Medical Center Inc. Employees Retirement Trust v. Fairfield Greenwich Group,* (S.D.N.Y. filed Jan. 8, 2009) (*Pacific West* class action); *Inter-American Trust v. Fairfield Greenwich Group,* (S.D.N.Y. filed Jan. 12, 2009) (*Inter-American Trust* class action); and *Stephenson v. Citco Group Limited,* No. 09-cv-716 (S.D.N.Y. filed Jan. 26, 2009) (individual action).

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[5] On May 18, 2009, the receiver presiding over the SIPA Liquidation Proceeding of BLM filed an adversary proceeding against the three FGG feeder funds. *See Schachter Decl.* Ex. D. The receiver did not name any PwC entity in that adversary proceeding. *Id.*

In mid-January the Court consolidated the *Anwar* and *Pacific West* class actions. *See Anwar* Docket Entry No. 12. Thereafter, counsel in *Anwar*, *Pacific West* and *Inter-American Trust* filed a motion seeking appointment as interim lead counsel and interim lead plaintiff. The Court granted that then-unopposed motion. *See Anwar* Docket Entry No. 40.

On March 11, 2009, investors filed *Knight* asserting violations of sections 10(b) and 20(a) of the Exchange Act; the Court consolidated *Knight* without objection on March 24, 2009. *See Anwar* Docket Entry No. 74.

On April 23, 2009, the Zohars filed their complaint against FGG, Fairfield Greenwich Limited, Fairfield Greenwich (Bermuda) Ltd., Fairfield Greenwich Advisors LLC, and Fairfield Sentry (collectively, the "Fairfield Defendants"), Walter M. Noel, Jr., Jeffrey H. Tucker, and Andres Piedrahita (collectively, the "Individual Defendants"), Citco Bank Nederland N.V., Dublin Branch, Citco Global Custody N.V., and Citco Fund Services (Europe) B.V. (collectively, the "Citco Defendants"), and the PwC Defendants.[6] *Zohar* alleges that the PwC Defendants provided services to Fairfield Sentry for the benefit of its investors, and that the PwC Defendants' negligent failures directly harmed them.

The next day, interim lead plaintiffs filed the *Anwar* Consolidated Amended Complaint naming, in addition to the Fairfield Defendants (with the exception of Fairfield Sentry),[7] the Individual Defendants, and the Citco Defendants: Fairfield Risk Services Ltd., Fairfield Heathcliff Capital LLC, Fairfield Greenwich (UK) Limited, Lion Fairfield Capital Management Ltd., Amit Vijayvergiya, Yanko Della Schiava, Philip Toub, Lourdes Barreneche, Cornelis Boele, Vianney D'Hendecourt, Jacqueline Harary, David Horn, Richard Landsberger, Daniel Lipton,

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[6] On April 30, 2009, the Zohars served PwCIL and PwC (US). *See Schachter Decl.* Ex. E. PwCIL and PwC (US) had until May 20, 2009 to respond to the summons and complaint.

[7] *Knight,* like *Zohar*, also named Fairfield Sentry. *See Knight* complaint ¶13.

Mark McKeefry, Maria Teresa Pulido Mendoza, Sanitago Reyes, Andrew Smith, Julia Luongo, Charles Murphy, Harold Greisman, Corina Noel Piedrahita, Robert Blum, Jan R. Naess, Peter P. Schmid, Brian Francouer, and Ian Pilgrim, Madoff, and GlobalOp Financial Services. The *Anwar* Consolidated Amended Complaint mentions, but does not assert any cause of action against, PwC. *See Anwar* Consolidated Amended Complaint ¶¶130, 132.

By Order dated May 5, 2009, this Court ordered *Zohar* consolidated with *Anwar* and directed the Clerk of the Court to close the *Zohar* docket. *See Anwar* Docket Entry No. 119.

ARGUMENT

I. FED. R. CIV. P. 42 PERMITS, BUT DOES NOT DEMAND, CONSOLIDATION TO ACHIEVE EFFICIENCY AND AVOID UNNECESSARY DELAYS OR COSTS

FED. R. CIV. P. 42 states in relevant part:

> (a) Consolidation. If actions before the court involve a common question of law or fact, the court ***may***:
> …
> (2) consolidate the actions; ***or***
> (3) ***issue any other orders to avoid unnecessary cost or delay***.

(Emphasis added.) Thus, while the Court has the discretion to consolidate actions before it, where other alternatives exist, the Court has the power to implement them as well. *See, e.g.*, FED. R. CIV. P. 21, 23(d), 42(a)(3), and 42(b).

> Rule 42(a) provides that consolidation is acceptable "[w]hen actions involving a common question of law or fact are pending before the court." Fed. R. Civ. P. 42(a). The Rule should be prudently employed as "a valuable and important tool of judicial administration," invoked to "expedite trial and eliminate unnecessary repetition and confusion." In assessing whether consolidation is appropriate in given circumstances, a district court should consider both equity and judicial economy. However, under the applicable law, ***efficiency cannot be permitted to prevail at the expense of justice***-consolidation should be considered when "savings of expense and gains of efficiency can be accomplished *without sacrifice of justice.*"

Devlin v. Transportation Commc'ns Int'l Union, 175 F.3d 121, 130 (2d Cir. 1999) (alteration in original)(citations omitted)(emphasis added). *See also Webb v. Goord*, 197 F.R.D. 98, 101 (S.D.N.Y. 2000) (Marrero, J.).

II. ZOHAR'S CLAIMS AGAINST THE PWC DEFENDANTS SHOULD NOT BE CONSOLIDATED

"[C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-497 (1933) (footnote omitted). *See also Cole v. Schenley Indus., Inc.*, 563 F.2d 35, 38 (2d Cir. 1977); *In re Citigroup Pension Plan ERISA Litig.*, 241 F.R.D. 172, 180 (S.D.N.Y. 2006). Given the procedural posture of the Fairfield Sentry-related class actions, consolidating *Zohar*'s claims against PwC Defendants with *Anwar* would run the risk of not having those claims prosecuted now. *Anwar* plaintiffs have filed a Consolidated Amended Complaint, and the Court has entered a case management order providing a briefing schedule for motions to dismiss. *See Anwar* Docket Entry No. 69, ¶¶5-7.

If *Zohar*'s claims against the PwC Defendants were consolidated with *Anwar*, but *Anwar* has asserted no cause of action asserted against them, how do those claims get prosecuted? Because the claims do not merge into *Anwar*, an answer is required, but PwC is not a party to the only action proceeding – *Anwar*. To avoid the complications that would arise from deeming *Zohar*'s claims against the PwC Defendants consolidated with *Anwar*, the Court should sever those claims, allow them to proceed in *Zohar* independently, and to the extent appropriate, order coordinated discovery with *Anwar*.

A. *Zohar* Asserts Different Claims Against Different, Unaffiliated Defendants

Zohar asserts five separate claims against the PwC Defendants:

Count XIV: Negligence against PwC (Rotterdam) and PwC (Toronto)

Count XV:	Negligence against PwC (Bermuda)
Count XVI:	Negligence against PwCIL and PwC (US)
Count XVII:	Negligent Misrepresentation against PwC (Rotterdam) and PwC (Toronto)
Count XVIII:	Negligent Misrepresentation against PwCIL and PwC (US)

None of the PwC Defendants is affiliated with any of the Fairfield Defendants, the Citco Defendants or the Individual Defendants.[8] Counts XIV through XVI arise out of the relationship between the PwC Defendants and the Fairfield Sentry investors by virtue of their engagement to perform audit and related services for Fairfield Sentry and upon which results Fairfield Sentry investors relied. Counts XVII and XVIII arise out of the PwC audit reports issued to Fairfield Sentry investors. These claims stand apart from those asserted in *Anwar*. Indeed, although the *Anwar* Consolidated Amended Complaint mentions PwC twice, it expressly elects not to assert any claims against any PwC Defendants.

The claims against the PwC Defendants in *Zohar* have different standards of pleading and proof from those asserted both in *Anwar* and *Knight*. *Anwar* asserts fraud and *Knight* asserts securities fraud claims. Those claims require pleading and proof of *scienter* that the negligence claims in *Zohar* against the PwC Defendants do not. The fraud claims in *Anwar* and the securities fraud claims in *Knight* require pleading in conformity with Rule 9(b). The negligence claims in *Zohar* against the PwC Defendants do not. The assertion of securities fraud claims in *Knight* also results in an automatic stay of discovery under the PSLRA. No such stay applies to the negligence claims in *Zohar* against the PwC Defendants. Thus, the differences between the negligence claims in *Zohar* against the PwC Defendants and the remaining claims against the defendants in *Anwar* and *Knight* counsel deconsolidation of these claims.

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[8] Indeed, where there is a "lack of a significant relationship between defendants," *Cain v. New York State Bd. of Elections*, 630 F. Supp. 221, 225 (E.D.N.Y. 1986), severance is an appropriate remedy.

Permitting consolidation of *Zohar*'s claims against the PwC Defendants would thus work an injustice exalting the appearance of judicial economy over fairness. Although avoidance of unnecessary duplication and costs are goals of consolidation, those goals do not supersede cause of justice. *Devlin*, 175 F.3d at 130; *Webb*, 197 F.R.D. at 100-101 (denying consolidation). Indeed, any perceived waste of the Court's and parties' resources can be ameliorated by coordination of discovery if and when overlapping discovery occurs.

B. The Court Should Allow *Zohar* to Proceed Against the PwC Defendants Separately from *Anwar*

FED. R. CIV. P. 21 permits the severance of claims to serve the ends of justice, *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 214 F.R.D. 152, 154 (S.D.N.Y. 2003), even where there has been no "misjoinder" of parties. *Spencer, White and Prentis Inc. of Connecticut v. Pfizer Inc.*, 498 F.2d 358, 361 (2d Cir. 1974); *Cain*, 630 F. Supp. at 225.

> In considering whether to sever claims under Rule 21, the Court considers: "(1) whether the claims arise out of the same transaction or occurrence; (2) whether the claims present some common questions of law or fact; (3) whether settlement of the claims or judicial economy would be facilitated; (4) whether prejudice would be avoided if severance were granted; and (5) whether different witnesses and documentary proof are required for the separate claims."

Preferred Medical Imaging, P.C. v. Allstate Ins. Co., 303 F. Supp. 2d 476, 477 (S.D.N.Y. 2004) (Marrero, J.) (*quoting In re Merrill Lynch*, 214 F.R.D. at 154-155). *See also Cestone v. General Cigar Holdings, Inc.*, No. 00CIV3686RCCDF, 2002 WL 424654 (S.D.N.Y. Mar. 18, 2002) (granting motion to sever where one plaintiff asserted claim against non-common defendant and plaintiffs needed separate documentary evidence and witnesses to prove their claims). Severance requires that the Zohars show only one of these factors. *Id.* at *3.

Severing *Zohar*'s claims against the PwC Defendants satisfies this Court's test. The claims derive from the actions or inactions of PwC Defendants arising out of their audit and other professional services related to the Fairfield Sentry financial statements. ¶¶154-164, 277-332. Thus, the witnesses and documentary proof will center upon PwC auditors, PwC audit work papers, and other documents obtained or reviewed by PwC in connection with its services. Moreover, denying severance would lead to prejudice because, while consolidation does not merge the claims or require the addition of parties from one case to another, Fairfield Sentry investors' claims against the PwC Defendants would remain in limbo indefinitely. Thus, severance of *Zohar*'s claims against PwC Defendants fosters judicial economy, ensures fairness to all parties, and still permits coordination with *Anwar* to avoid any unnecessary duplication of effort in discovery should overlap exist.

CONCLUSION

For the foregoing reasons, the Zohars respectfully request that the Court sustain their objection to consolidation, deconsolidate and sever the claims in *Zohar* as against the PwC Defendants.

Dated: May 20, 2009

Respectfully submitted,

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